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No. 71-1299

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

NICK KARNEGES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

Department of Justice,
Washington, D.C. 20530.

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1. This action was commenced in the United States District Court for the Southern District of California on behalf of James Peter Karneges, deceased, against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346, 2671-2680. Karneges, a member of the United States Marine Corps, was killed in an automobile accident while riding as a passenger in

a private car in which he and the driver, another Marine, were travelling under military group travel orders (Pet. App. C, p. v). The complaint alleged that the driver was a government employee, that at the time of the collision he was acting within the scope of his employment, and that his negligence caused the accident (*ibid*).

The district court ruled (Pet. App. c, pp. v-vi) that recovery was barred under the decision of this Court in *Feres* v. *United States*, 340 U.S. 135, since, at the time of the accident, Karneges was engaged in activity "incident to military service." Moreover, it observed (Pet. App. c, p. vi) that, if Karneges and the driver had not been acting within "the line of military duty," the driver would not have been acting within the scope of his employment, and, as a consequence, the United States could not, for an entirely separate reason, have been held liable under the Federal Tort Claims Act. The court of appeals summarily affirmed (Pet. App. A, pp. i-ii).

2. The decisions below are correct; they do not conflict with the decisions of other circuits and present no grounds for further review by this Court.

Karneges, a member of the Marine Corps, was concededly (Pet. 3) travelling pursuant to military group travel orders at the time of the accident. The fact that he was in a private vehicle when he sustained his fatal injuries does not alter the conclusion that those injuries occurred while he was acting "in the course of military duty." *Feres* v. *United States*,

supra, 340 U.S. at 146. Accordingly, the courts below properly barred recovery.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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[1] Petitioners' claim that the decision below is in conflict with *Hale* v. *United States*, 416 F.2d 355 (C.A. 6), is not well taken. *Hale* did not involve injuries sustained in the course of travel pursuant to military orders. In any event, following the court's remand in *Hale*, both the district court and the court of appeals denied recovery under *Feres* for the same reason given here—*i.e.*, that the injuries were sustained incident to military service. See *Hale* v. *United States*, 452 F.2d 668 (C.A. 6).

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